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No. 86-1027

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

SUN-LAND NURSERIES, INC., a California corporation,
Petitioner,

v.

SOUTHERN CALIFORNIA DISTRICT COUNCIL OF LABORERS;
AFFILIATED LABORERS LOCAL UNION 300;
AFFILIATED LABORERS LOCAL UNION 652; and
AFFILIATED LABORERS LOCAL UNION 1082,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

JULIUS REICH *
ALEXANDER B. CVITAN
REICH, ADELL & CROST
A Professional Law Corporation
501 Shatto Place
Suite 100
Los Angeles, California 90020
(213) 386-3860

Attorneys for Respondents

* Counsel of record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents Southern California District Council of Laborers and its affiliated Local Union Nos. 300, 652 and 1082 ("Laborers") oppose the granting of a writ of certiorari filed by Sun-Land Nurseries, Inc. ("Sun-Land").

REASONS WRIT SHOULD BE DENIED

This Court has already reviewed and resolved the labor law issue of this case in a unanimous decision in *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645 (1982).

On the antitrust issue there is no conflict among the courts of appeals: they have been in accord from the first such ruling more than 20 years ago in *Suburban Tile Center v. Rockford Building Trades Council*, 354 F.2d 1 (7th Cir. 1965), *cert. denied*, 384 U.S. 960 (1966), to the previous most recent one in *A.L. Adams Construction Co. v. Georgia Power Co.*, 733 F.2d 853 (11th Cir. 1984), *cert. denied*, 105 S.Ct. 2155 (1985). Finally, the procedural issue raised is a specious one, as will be seen from the facts described below which were omitted by Sun-Land from its Statement of the Case. No issue here merits the Court's resources.

STATEMENT OF THE CASE

Sun-Land's complaint in the district court alleged that a clause in the Laborers' collective bargaining agreement violated the Labor Management Relations Act ("LMRA") and the Sherman Act. As filed, the complaint also contained four separate claims of anticompetitive conduct, unprotected by the labor laws, which by reference were incorporated into the antitrust claims.

After discovery, Sun-Land stipulated to a dismissal of the claims dealing with anticompetitive conduct. All that remained at the time of the cross-motions for summary judgment was the contract clause and stipulated facts.

ARGUMENT

A. THE PROCEDURAL POINT IS SPECIOUS AND NOT WORTHY OF REVIEW.

Sun-Land argues that because the court of appeals decided the antitrust issue on a different ground than did the district court, Sun-Land was precluded from presenting its views. As noted in our Statement of the Case, all that remained of the complaint after discovery and Sun-Land's dismissal of allegations of unlawful conduct, was the contract language itself, upon which the district court ruled against Sun-Land. That judgment was affirmed by the court of appeals.

During oral argument before the court of appeals, Sun-Land seized upon the suggestion that only by adding evidence of illegal conduct to the bare contract language, was there a possibility of making out a violation of the antitrust laws. But the opportunity to do that had long expired.[1]

Nor was Sun-Land caught by surprise. In the district court it filed its own cross-motion for summary judgment, also relying exclusively upon the parties' stipulated facts and the bare contract language. The district court entered judgment against Sun-Land on that motion, as well.

If Sun-Land was surprised by the court of appeals' ruling that the Laborers' contract without additional evidence of antitrust conduct does not make out a violation of law, it should not have been. In three Ninth Circuit cases that preceded the motions for summary judgment, the court of appeals had refused under the antitrust laws to invalidate labor agreements based upon the bare language of the contract. *See Brogan v. Swanson Painting Co.*, 682 F.2d 807, 810 (9th Cir. 1982); *Granddad Bread v. Continental Baking Co.*, 612 F.2d 1105, 1110 (9th Cir. 1979), *cert. denied*, 449 U.S. 1076 (1981); *California Dump Truck Owners Association v. Associated General Contractors*, 562 F.2d 607, 614 (9th Cir. 1977).

The court of appeals in *California Dump Truck, supra*, remanded the matter to the district court to examine the "other means" of fixing prices that the plaintiff had alleged in the complaint. 562 F.2d at 614-15. But here,

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[1] Rule 7.14.2 of the Local Rules of the Central District of California requires a party who opposes a motion for summary judgment to file a "Statement of Genuine Issues," setting forth all material facts as to which it contends there exists a genuine issue necessary to be litigated. Sun-Land filed no such document, and did not contend in the district court or in its brief to the court of appeals that it had any material facts to add to its case.

the only unlawful conduct in the complaint after the voluntary dismissal of the second, third, fourth and fifth claims, was the contract clause.

For these reasons, it is disingenuous for Sun-Land to argue now that it was prejudiced by the court of appeals' action. Having engaged in discovery and come up empty-handed, Sun-Land was forced to rely only upon the contract language; and it has yet to suggest what other evidence it has or could adduce.[2]

B. THE LABOR LAW ISSUES ARE SETTLED AND INVOLVE NO CONFLICTING DECISIONS.

Sun-Land contends that because it has a collective bargaining agreement, albeit not with the Laborers, the construction industry proviso to LMRA § 8(e), 29 U.S.C. § 158(e), should not protect the Laborers' subcontract clause; and that this issue requires clarification by the Court.

Further clarification is unnecessary. The district court, the panel decision of the court of appeals, and the en banc decision of the court of appeals (a total of 14 different judges) were unanimous in their view that Sun-Land's agreement with an independent union did not serve to invalidate the Laborers' subcontract clause.[3] All relied

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[2] This case is distinguishable, therefore, from those summary judgment cases cited by Sun-Land in its petition at 26-27. In each of those cases, either additional evidence was alluded to, *see, e.g., Smith v. United States*, 362 F.2d 366, 367-68 (9th Cir. 1966); *Brawner v. Pearl Assurance Co.*, 267 F.2d 45, 49 (9th Cir. 1958), or the matter was remanded to deal with substantive issues that remained in the complaint and had not been addressed in the summary judgment motion, *see, e.g., Zook v. Brown*, 748 F.2d 1161, 1166 (7th Cir. 1984). Here, having dismissed all the other issues in the case, there was none left to address.

[3] The dissent from the en banc decision agreed on the law, but argued that additional evidence might help Sun-Land's case. As noted in Argument A, Sun-Land had no additional evidence.

upon this Court's decision in *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645 (1982).

Before the construction industry proviso to LMRA § 8(e) was adopted, the Joint Subcommittee of the House Committee on Education and Labor heard testimony from

> "[r]epresentatives of an employer and an independent union [who] complained that employers and unions could lawfully enter into subcontracting clauses, and that, as a result, *employers whose employees had selected another union were denied any opportunity to compete for construction jobs.* They described agreements very similar to those at issue here." *Woelke & Romero*, 456 U.S. at 658 (emphasis added).

In addition to this testimony before the Committee, the text of the decision in *Operating Engineers Local 3 v. NLRB*, 266 F.2d 905 (D.C. Cir.), *cert. denied sub nom. St. Maurice, Helmkamp & Musser v. NLRB*, 361 U.S. 834 (1959), was introduced into the record. *Woelke & Romero*, 456 U.S. at 659 n.11. The *Operating Engineers* case was similar to this one, in that the contract clause required subcontractors to be signatory to the Operating Engineers' agreement, and a subcontractor who was signed to an agreement with an independent union lost a job for that reason. *Operating Engineers*, 266 F.2d at 908.

Evidence that these matters were before Congress and that Congress nonetheless specifically exempted the construction (and garment) industry from the prohibitions of LMRA § 8(e), led this Court to conclude that subcontracting clauses such as the one in the *Operating Engineers* case (and the Laborers' clause) that had been lawful in the construction industry prior to 1959, continue to be lawful under the first proviso to LMRA § 8(e). *Woelke & Romero*, 456 U.S. at 654 ("The legislative history of § 8(e) and the construction industry

proviso clearly indicates that Congress intended to protect subcontracting clauses like those at issue here").

The Court was unanimous in *Woelke & Romero*, and there is nothing presented by Sun-Land to indicate that the decision requires review.

C. THE COURTS OF APPEALS ARE UNANIMOUS IN THEIR VIEW OF THE ANTITRUST LAW.

Each of the three other courts of appeals that has dealt with the issue of whether in the construciton or garment industry a collective bargaining agreement's subcontracting clause violates the antitrust laws, has ruled identically to the Ninth Circuit in this case. *See A.L. Adams Construction Co. v. Georgia Power Co.*, 733 F.2d 853, 858 (11th Cir. 1984), *cert. denied*, 105 S.Ct. 2155 (1985) (construction industry proviso saves subcontracting clause from antitrust laws); *Jou Jou Designs v. International Ladies Garment Workers Union*, 643 F.2d 905, 910 (2d Cir. 1981) (garment industry proviso saves subcontracting clause from antitrust laws); *Suburban Tile Center v. Rockford Building Trades Council*, 354 F.2d 1, 3 (7th Cir. 1965), *cert. denied*, 384 U.S. 960 (1966) (construction industry).

Even the dissenting judges of the Ninth Circuit all agreed that a valid subcontracting clause alone is insufficient to support an antitrust claim [Petition, A-21]; but disagreed with the majority only on the summary judgment issue.

There is no conflict among the courts of appeals on the substantive legal issue raised by this case of whether a subcontracting clause alone, with no other evidence of anticompetitive intent or conduct unprotected by the labor laws, violates the antitrust laws. Each says no. So too does each member of the Ninth Circuit's en banc panel. No reason exists for this Court to clarify what is unambiguous.

CONCLUSION

This case presents a mine-run procedural issue, as well as labor and antitrust matters are already clear. For these reasons, certiorari should be denied.

Respectfully submitted,

JULIUS REICH *
ALEXANDER B. CVITAN
REICH, ADELL & CROST
A Professional Law Corporation
501 Shatto Place
Suite 100
Los Angeles, California 90020
(213) 386-3860

Attorneys for Respondents

* Counsel of record